

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41I 30118254 BY HELENA SCHOOL DISTRICT NO. 1	} } }	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On August 22, 2018, Helena School District #1 (Applicant) submitted Application for Beneficial Water Use Permit No. 41I 30118254 to the Helena Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 100 GPM flow rate and 3.7 AF volume. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 14, 2019. The Applicant responded with information dated March 11, 2019. The Application was determined to be correct and complete as of November 8, 2019. This application is for a groundwater appropriation in a closed basin, and is subject to HB 831 (2007). The mitigation plan requirements under § 85-2-360, MCA, for the proposed appropriation are satisfied by the Department's prior issuance of Application for Change of a Water Right No. 41I 30046071. An Environmental Assessment for this Application was completed on February 21, 2020. The Applicant submitted a Petition to Modify Water Right Change Authorization 41I 30046071 on October 7, 2020 to modify the condition language included in the change authorization to include proposed Beneficial Use Permit No. 41I 30118254. The Department issued a Final Determination to Grant Petition to Modify Change 41I 30046071 on February 18, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 41I 30118254

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Aerial photo with well locations and property outlines
- Aquifer Testing Addendum
- Basin Closure Area Addendum
- Hydrogeologic Assessment Report Addendum
- Mitigation Plan
- Permit 41I 30046072 Statement of Opinion

Information Received after Application Filed

- Deficiency Response Letter dated March 11, 2019
- Aquifer Testing Variance Request dated September 6, 2019
- Aquifer Testing Variance Grant e-mail from Melissa Schaar, DNRC Groundwater Hydrologist, dated September 9, 2019
- Darcy Return Flow Analysis e-mail from Melissa Schaar dated October 17, 2019

Information within the Department's Possession/Knowledge

- Aquifer Test Report by Melissa Schaar, Department Groundwater Hydrologist, dated September 9, 2019
- Petition to Modify Water Right Change Authorization 41I 30046071 submitted by Applicant on October 7, 2020
- Final Determination to Grant Petition to Modify Change issued by the Department on February 18, 2021

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater, by means of a 177-ft deep well, from January 1 to December 31 at 100 gallons per minute (GPM) up to 3.7 Acre-feet (AF) annually, from a point in the SWSESE of Section 18, Township 11 North, Range 3 West, Lewis and Clark County, for Institutional use at the Jim Darcy School from January 1 to December 31. The place of use is generally located SWSESE of Section 18, Township 11 North, Range 3 West, Lewis and Clark County.
2. The proposed well is located approximately 3 miles west-northwest of Lake Helena, and is a comparable distance to both the confluence of Silver Creek and Prickly Pear Creek with Lake Helena.
3. Wastewater from the proposed appropriation will return to the source aquifer through a septic and drainfield system.
4. The proposed consumptive use will be 0.37 AF per year, based on the 10% consumption factor identified in Beneficial Use Permit Application No. 41I 30046072 for the same Institutional purpose and the same flow rate and volume. Applicant has acquired ownership of the 3.7 AF portion of Permit No. 41I 30046072, which was never completed and will be removed from this permit during the project completion processing.
5. The following conditions will apply if the proposed permit is issued:
 1. Diversion under this Permit may not commence until the mitigation or aquifer recharge plan described in this decision is legally implemented. Diversion under this Permit must stop if the mitigation plan as herein required in amount, location and duration ceases in whole or in part.
 2. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the department, the appropriator shall keep a written *monthly* record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted

by January 31st of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the water resources regional office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

BASIN CLOSURE

FINDINGS OF FACT

6. This application is for Institutional use. This Application is located within the Statutory Upper Missouri basin closure (§ 85-2-343, MCA).
7. Applicant submitted a hydrogeologic assessment determined to be correct and complete.
8. Applicant proposes to use the mitigation plan previously approved for Permit No. 41I 30046072, and as authorized by Application to Change Water Right No. 41I 30046071, for the same Institutional purpose and the same flow rate and volume. Applicant has acquired ownership of the 3.7 AF portion of Permit No. 41I 30046072, which was never completed and will be removed from this permit as part of the project completion processing.
9. Applicant submitted a Petition to Modify Water Right Change Authorization 41I 30046071 on October 7, 2020 to modify the condition language included in the change authorization to include pending Beneficial Use Permit No. 41I 30118254. The Department issued a Final Determination to Grant Petition to Modify Change on February 18, 2021.

CONCLUSIONS OF LAW

10. As provided in § 85-2-319, MCA the Department may not grant an application for a permit to appropriate water or for a state water reservation within the Upper Missouri River Basin until the final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin § 85-2-343(1), MCA. The upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries

above Morony Dam. § 85-2-342(4), MCA. This Application is within the Upper Missouri River Basin closure and is for a permit to appropriate groundwater, which falls under the exceptions for the basin closure. § 85-2-343 (2)(a), MCA.

11. Pursuant to § 85-2-360, MCA, a combined application for new appropriations of groundwater in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. § 85-2-360, MCA. ARM 36.12.120. E.g., *In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer* (DNRC Final Order 2010, Combined Application)(combined application under §85-2-360, MCA, reviewed as a single unit).

12. In reviewing an application for groundwater in a closed basin, the District Court in Sitz Ranch v. DNRC observed:

The basin from which applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7.

13. A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee*

(DNRC Final Order 2011); *In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen*, (DNRC Final Order 2011).

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

14. The Montana Constitution expressly recognizes in relevant part that:

- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
- (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

15. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

16. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further

compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

17. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

18. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

19. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

20. Applicant submitted 24-hour aquifer test data for the proposed diversion. The proposed well was completed to a depth of 177 feet and perforated from 118 to 170 feet, with a static water level of 48.7 feet. Both stepped rate and constant rate tests were performed. Based on the proposed use, the well is predicted to experience up to 0.3 feet of drawdown, and the available water column is 128.0 feet. A zone of influence with a radius of 1,050 feet from the proposed well was calculated based on a 0.01 ft predicted drawdown.

21. Groundwater flux in the proposed aquifer was modeled at 389 AF/year (See Aquifer Test Report dated September 9, 2019) therefore the requested diverted volume of 3.7 AF is physically available.

22. Applicant's aquifer test data was reviewed by Melissa Schaar, Groundwater Hydrologist – DNRC Water Management Bureau. On September 6, 2019 the Applicant requested an Aquifer Testing Variance Request to address gaps in monitoring data in the production and monitoring wells, and the Department determined that the variance from ARM 36.12.121 (3)(j) was justified and granted on Monday, September 9, 2019. (E-mail granting variance from Melissa Schaar and letter from Bryan Gartland, both dated Monday, September 9, 2019)

CONCLUSIONS OF LAW

23. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

24. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application*

for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson (DNRC Final Order 1990); In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean (DNRC Final Order 1994).

25. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 20-22)

Legal Availability:

FINDINGS OF FACT

26. Department Groundwater Hydrologist Melissa Schaar identified 19 wells with associated water rights located within the 0.01foot drawdown contour that needed to be evaluated for legal availability in Table 1 below:

Table 1

Water Right	Owner	Flow Rate GPM	Volume AF
41I 90085 00	HELENA SCHOOL DISTRICT NO. 1	100	15.23
41I 30115508	BALLINGER FAMILY TRUST	15	4.85
41I 86058 00	JJT ADVENTURES LLC	135	4.65
41I 86058 00	JJT ADVENTURES LLC	135	4.65
41I 102963 00	GARRY R GUETTLER	15	3.5
41I 113800 00	WILLIAM GUYAZ	15	2.91
41I 30103450	DARLENE R ABELN; MICHAEL R ABELN	35	2.25
41I 77633 00	HELENA SCHOOL DISTRICT NO. 1	20	2.25
41I 30067059	ROBERT S KINYON; LAURA M PLASKA	30	2.08
41I 30072739	ADELE R MARCHI; JON J MARCHI	15	1.68
41I 100150 00	TULLIS, LOIS L LIVING TRUST	20	1.63
41I 83483 00	JJT ADVENTURES LLC	15	1.63
41I 30103643	DONNA GLEAVES; GLEN GLEAVES	35	1.63
41I 30105266	KARLA M RYDEEN; KRISTI L RYDEEN; RICHARD O RYDEEN	5	1.63
41I 30116383	THOMAS D CHANDLER	14	1.33
41I 30066915	COLTON W GILL; LAURA M GILL	30	1
41I 30070489	JAY KNUDSON; YUKA KNUDSON	15	1

41I 30070332	HARLEY BREKER	14	1
41I 30072267	KENNETH S COOPER	30	1

The existing annual legal demands within the zone of influence are 55.9 AF, and the available volume in the aquifer within the zone of influence is 389.0 AF. (See Aquifer Test Report dated September 9, 2019)

27. The Applicant asserts that depletions to surface water are equivalent to those identified by the Department's depletion analysis for the Institutional Use component of Permit Application 41I 30046072 for Grand Valley Estates. This assertion was deemed appropriate by Department Groundwater Hydrologist Melissa Schaar. (E-mail from Melissa Schaar dated Thursday October 17, 2019) The Department identified Prickly Pear Creek and Silver Creek as connected surface water sources, with the affected reach identified as the confluence of Prickly Pear Creek and Silver Creek to Lake Helena. The consumptive volume of 0.37 AF/year or 0.03 AF/month is the amount predicted to be depleted from these surface water sources.

28. Applicant has addressed legal availability of surface water by providing a mitigation plan which proposes to mitigate the predicted depletions to surface water in full. Predicted annual surface water depletions of 0.37 AF to Prickly Pear Creek and Silver Creek are adequately mitigated through the previous retirement of surface and groundwater irrigation under Change Authorization 41I 30046071 to provide 1.37 AF of annual mitigation for the proposed Institutional use.

29. The physical amount of water available is 389.0 AF/year and the existing legal demands of groundwater total 55.9 AF/year. The comparison shows that water is legally available. (389.0 – 55.9 = 333.1)

CONCLUSIONS OF LAW

30. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis

involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

31. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

32. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert

and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, citing Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, citing Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

33. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge

plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

34. Based on the Applicant’s proposed mitigation plan, the Department finds that the Applicant has proven by a preponderance of the evidence that groundwater can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (FOF 26-29)

35. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA.

Adverse Effect

FINDINGS OF FACT

36. Applicant proposes to utilize the existing mitigation plan for the proposed use as authorized under Permit Application 41I 30046072. (See Permit Application 41I 30046072 Statement of Opinion). Under this plan, water in excess of the calculated depletions to surface water has been retired from surface and groundwater irrigation to account for predicted depletions resulting from the proposed use. The proposed flow rate, volume, and place of use under this application are the same as the Institutional use from Permit 41I 30046072. The Institutional portion of 41I 30046072 was never completed and will be removed when the project completion is finalized. As stated by Department Groundwater Hydrologist Melissa Schaar in her October 17, 2019 e-mail, the distance between the proposed well and the well identified in the depletion analysis for Permit 41I 30046072 is close enough relative to the depleted surface water reaches that the existing mitigation plan is adequate to mitigate depletions from the proposed use.

37. Applicant submitted a Petition to Modify Water Right Change Authorization 41I 30046071 on October 7, 2020 to modify the condition language included in the change

authorization to include pending Beneficial Use Permit No. 41I 30118254. The Department issued a Final Determination to Grant Petition to Modify Change on February 18, 2021.

38. There are no water rights in the source aquifer that are predicted to experience drawdown greater than 1 foot, therefore no adverse effect to groundwater is expected.

39. The Department finds that the existing mitigation plan provided by Change Authorization 41I 30046071 is sufficient to offset depletions to surface water from the proposed use. There will be no adverse effect because groundwater is legally available in the source aquifer and the predicted annual surface water depletions of 0.37 AF to Prickly Pear Creek and Silver Creek are adequately mitigated through the previous retirement of surface and groundwater irrigation under Change Authorization 41I 30046071 to provide 1.37 AF of annual mitigation.

CONCLUSIONS OF LAW

40. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc., ¶ 21.

41. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

42. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

43. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

44. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

45. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

46. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant’s burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected applicant’s argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant’s arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was “not an adverse effect because it’s not measureable,” and that the depletion “won’t change how things are administered on the source.”).

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

47. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

48. It was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10.

49. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992)(applicant must show that at least in some years no

legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

50. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-G76L by Cross*, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

51.

A plan to prove legal availability and prevent adverse effect can be to use mitigation or augmentation. § 85-2-360, MCA; e.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), *affirmed*, Montana River Action Network v. DNRC, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court,

Order Affirming DNRC Decision, (2011) Pg. 7; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12; *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (HB 831, DNRC Final Order 2009) (permit denied in part for failure to analyze legal availability for surface water for depletion of 1.31 AF to Bitterroot River)§ 85-2-360, MCA. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*, DNRC Final Order (2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC*.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See Thompson v. Harvey (1974),154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587. Augmentation/ mitigation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(Emphasis added.)

52. Pursuant to § 85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

53. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC (DNRC Final Order 2008).

54. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b) , MCA. (FOF 36-39)

Adequate Diversion

FINDINGS OF FACT

55. The proposed well utilizes a 10-horsepower pump capable of producing 100 GPM against 300 feet of total dynamic head. The well will be controlled by an automated system to provide up to 100 GPM on demand.

56. Aquifer test data from the proposed well resulted in a maximum drawdown of 16.6 ft after a constant pumping rate of 150 gpm for 24 hours, leaving an available water column of 52.7 ft.(See Aquifer Test Report dated September 9, 2019)

CONCLUSIONS OF LAW

57. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

58. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

59. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

60. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

61. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 55-56).

Beneficial Use

FINDINGS OF FACT

62. The proposed purpose is Institutional use for Jim Darcy School. The requested flow rate is 100 GPM and the requested volume is 3.7 AF/year.

63. Institutional use for a public school is a beneficial use under 85-2-102 (5)(a) as water for use by the public.

64. The requested flow rate and volume are based the need to meet potential maximum use requirements for a school with 500 students and 75 faculty.

CONCLUSIONS OF LAW

65. 61. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed on other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

66. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

67. Applicant proposes to use water for Institutional use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence Institutional use is

a beneficial use and that 3.7 AF of diverted volume and 100 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 62-64)

Possessory Interest

FINDINGS OF FACT

68. The Applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

69. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

70. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

71. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF No. 68)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41I 30118254 should be **GRANTED**.

The Department determines the Applicant may divert groundwater, by means of a 177 foot deep well, from January 1 to December 31 at 100 GPM up to 3.7 AF, from a point in the SWSESE Section 18, Township 11 North, Range 3 West, Lewis and Clark County, for Institutional use from January 1 to December 31. The place of use is located in the SWSESE Section 18, Township 11 North, Range 3 West, Lewis and Clark County.

72. Stream depletions will occur in Prickly Pear Creek and Silver Creek, from their confluence to Lake Helena. 1.37 AF of water to mitigate depletions of 0.37 AF in the affected reaches has been provided by the retirement of surface and groundwater irrigation as described in Change Authorization 41I 30046071 as part of the mitigation plan completed under Permit 41I 30046072.

The application will be subject to the following conditions, limitations or restrictions.

3. Diversion under this Permit may not commence until the mitigation plan described in this decision is legally implemented. Diversion under this Permit must stop if the mitigation plan as herein required in amount, location and duration ceases in whole or in part.

4. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the department, the appropriator shall keep a written *monthly* record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by January 31st of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the water resources regional office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 25th day of March, 2021.

/original signed by Bryan Gartland/

Bryan Gartland, Manager

Helena Regional Office

Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 25th day of March 2021, by first class United States mail.

HELENA SCHOOL DISTRICT #1
55 S RODNEY STREET
HELENA, MT 59601

NAME

DATE